

## **TENTATIVE RULINGS for CIVIL LAW and MOTION May 27, 2010**

Pursuant to Yolo County Local Rules, the following tentative rulings will become the order of the court unless, by 4:00 p.m. on the court day before the hearing, a party requests a hearing and notifies other counsel of the hearing. To request a hearing, you must contact the clerk of the department where the hearing is to be held. Copies of the tentative rulings will be posted at the entrance to the courtroom and on the Yolo Courts Website, at [www.yolo.courts.ca.gov](http://www.yolo.courts.ca.gov). If you are scheduled to appear and there is no tentative ruling in your case, you should appear as scheduled.

Telephone number for the clerk in Department Fifteen: (530) 406-6941

### **TENTATIVE RULING**

**Case:** **Branner v. The Regents of the University of California**  
**Case No. CV CV 08-2007**

**Hearing Date:** **May 27, 2010** **Department Fifteen** **9:00 a.m.**

**Defendant's request for judicial notice:** The Court takes notice of Exhibits A, B, C, E, F, G, H, I, and K to the defendant's request for judicial notice filed on April 2, 2010. (Evid. Code, § 452, subds. (c) and (d); *Scharf v. Regents of Univ. of Cal.* (1991) 234 Cal.App.3d 1393, 1398, fn. 3; *Chas. L. Harney, Inc. v. State* (1963) 217 Cal.App.2d 77, 85-86; *Kashmiri v. Regents of University of Cal.* (2007) 156 Cal.App.4th 809, 822, fn. 7.) The Court takes notice of the timing, nature and scope of the grievances, claims or actions and the context in which they were made or brought, but does not take notice of the truth of the facts stated therein. All other requests for judicial notice by the defendant are **DENIED**.

**Plaintiff's evidentiary objections:** Evidentiary objection number 2 to the Declaration of Bruce Hupe and evidentiary objection numbers 1 (except as to the fifth sentence in paragraph 3) and 2-5 to the Declaration of George Acero are **SUSTAINED**. All other evidentiary objections by the plaintiff are **OVERRULED**.

**Defendant's demurrer to the second amended complaint:** Although the instant demurrer repeats many of the arguments raised in the demurrer the defendants filed on September 8, 2008, the Court did not decide the earlier demurrer because before the hearing on that demurrer, the plaintiff filed a first amended complaint. The Court also did not rule on the merits of the defendants' motion for judgment on the pleadings filed on December 21, 2009, and the merits of the plaintiff's intentional infliction of emotional distress ("IIED") claim when it granted the plaintiff leave to file a second amended complaint.

The demurrer based on statute of limitations is **SUSTAINED WITH LEAVE TO AMEND**. (Code Civ. Proc., § 335.1; Second amended complaint ¶¶ 1-39; Exhibits F, H and I to The Regents' Request for Judicial Notice; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387; *Dept. of*

*Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1288, fn. 23.) Defendants' special motion to strike did not raise and, in ruling on such motion, the Court did not decide the issue of whether the plaintiff's IIED claim is time-barred.

The only act complained of in the second amended complaint that occurred within two years of the date when the plaintiff filed the initial complaint is the January 11, 2007, letter by Vice Provost Barbara Horwitz. As was previously found in this case, this letter is privileged under Civil Code section 47, subdivision (b). (Page 4 of December 17, 2009, order on the defendants' special motion to strike; pages 4-5 of March 19, 2009, order on the plaintiff's motion for reconsideration.) Because it is privileged, Ms. Horwitz decision and letter cannot form the basis of an IIED claim.

Plaintiff contends that his IIED claim was timely filed under the continuing violation doctrine. The Court has not found and no one cites a case applying the continuing violation doctrine to an IIED claim. Even if the continuing violation doctrine applies to an IIED claim, nothing before the Court shows that this doctrine "saves" the plaintiff's IIED claim from the time bar. The continuing violation doctrine allows liability for unlawful conduct occurring outside the limitations period if such conduct is sufficiently connection to an unlawful conduct within the limitations period. (*Richards v. SH2M Hill, Inc.* (2001) 26 Cal.4<sup>th</sup> 798, 802.) Other than Ms. Horwitz' January 11, 2007, letter, which is privileged, the second amended complaint does not allege any unlawful conduct that occurred within two years from the filing of the initial complaint.

Plaintiff contends that his IIED claim was equitably tolled during the period when his Privileges and Tenure Committee ("P&T Committee") grievance was being processed. There is nothing on the face of the second amended complaint or in the matters of which the Court has been asked to take notice which shows that the plaintiff's P&T Committee grievance raised facts or claims to alert the defendant that the plaintiff claimed emotional distress injuries, that the plaintiff believed that various University employees intended to cause the plaintiff emotional distress or acted with reckless disregard of the probability of causing the plaintiff emotional distress, or that the plaintiff was complaining about acts that date back to the late 1980s. (SAC ¶ 25.) There is no basis for this Court to conclude that the plaintiff's P&T Committee grievance gave the defendant timely notice about the plaintiff's emotional distress injuries and allowed the defendant to assemble a defense as to such claim when the facts were still fresh. Accordingly, the Court finds, based on what is before it, that it is not appropriate to apply equitable tolling.

Because it is possible for the plaintiff to amend his complaint to avoid the time bar, leave to amend is **GRANTED**. Because leave to amend is granted, the Court does not decide the grounds for the demurrer not addressed herein.

The demurrer based on failure to allege sufficient facts to show that the plaintiff suffered severe emotional distress is **SUSTAINED WITH LEAVE TO AMEND**. (*Bogard v. Employers Cas. Co.* (1985) 164 Cal.App.3d 602, 607 and 617.)

Plaintiff shall file a third amended complaint, if any, **by June 7, 2010**.

The demurrer based on Workers' Compensation Act preemption is **OVERRULED**. The Honorable Judge Doris Shockley's December 17, 2009, order on the defendants' special motion to strike found that "[e]motional distress claims caused by alleged discrimination are not preempted by the Workers' Compensation Act." No one filed an appeal or motion for reconsideration as to this portion of Judge Shockley's order. Although Judge Shockley's ruling was made in the context of a Code of Civil Procedure section 425.16 motion, the factual allegations for the IIED cause of action in the second amended complaint are not substantially different from those in the initial complaint and the defendant's preemption argument in the instant demurrer and in the Code of Civil Procedure section 425.16 motion does not differ. It is not proper for one judge to change the order issued by another judge of the same court. (*People v. Superior Court of Los Angeles County* (1967) 249 Cal.App.2d 727, 734-735; *Church of Scientology of Calif. v. Armstrong* (1991) 232 Cal.App.3d 1060, 1068-1070.)

The demurrer based on Civil Code section 47, subdivision (b) is **OVERRULED**. Civil Code section 47, subdivision (b) does not completely dispose of the IIED cause of action.

The demurrer based on privacy is **OVERRULED**. The authorities the defendant cites in support of this portion of its demurrer do not support the conclusion that the plaintiff cannot state a cause of action for IIED. For the same reason, the demurrer based on *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077 is **OVERRULED**.

The demurrer based on grounds that lie to only part of the plaintiff's IIED cause of action is **OVERRULED**.

**Defendant's motion to strike**: The unopposed motion to strike all causes of action alleged against Barbara Horwitz is **GRANTED**.

The unopposed motion to strike the request for punitive damages and attorney's fees is **GRANTED**.

The motion to strike allegations about M.S.'s complaints against the plaintiff is **DENIED**. Even if the Court finds that M.S.'s complaints are not actionable, such complaints may be relevant background information for alleged unlawful acts.

For the reasons stated as to the demurrer on the same grounds, the motion to strike based on M.S.'s right to privacy and the Workers' Compensation Act is **DENIED**.

The motion to strike the allegation in the second amended complaint that Professor Knoesen is a white South African is **DENIED**. It is not known at this time whether these alleged facts are relevant to the plaintiff's claims.

Defendant withdrew its motion to strike the request for special damages in the second amended complaint.

Because leave to amend is granted, the Court declines to rule on the motion to strike the allegation that the plaintiff was denied a promotion from 1984 to 2001.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

#### **TENTATIVE RULING**

**Case:** County Fair Fashion Mall, LLC v. Davies  
Case No. CV CV 08-3330

**Hearing Date:** May 27, 2010 Department Fifteen 9:00 a.m.

Defendant Jodean Davies' motion to compel the attendance of plaintiff Raymond Arjmand and production of documents in response to demands for inspection is **DENIED**. There is no evidence before the Court of an agreement to extend discovery or the discovery motion cut-off beyond the cut-offs imposed by the initial trial date and no motion for leave to re-open discovery that complies with Code of Civil Procedure section 2024.050. (Code Civ. Proc., §§ 2024.020, 2024.050, & 2024.060; *Pelton-Shepherd Indus., Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal.App.4<sup>th</sup> 1568.)

The motion to continue trial is **GRANTED**. A further Case Management Conference is set for Thursday, June 3, 2010, at 1:30 p.m. in Department Ten (275 First Street, Woodland, California) so that a new date may be set.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

#### **TENTATIVE RULING**

**Case:** Earth Savers, Inc. v. Earthsavers Erosion Control, LLC  
Case No. CV CV 09-2133

**Hearing Date:** May 27, 2010 Department Fifteen 9:00 a.m.

Cross-defendant Robert J. Intner's demurrer to the first amended cross-complaint is **OVERRULED**. (Civ. Code, § 1714.10, subd. (c); Code Civ. Proc., § 430.10, subd. (e); *Pavicich v. Santucci* (2000) 85 Cal.App.4<sup>th</sup> 382; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4<sup>th</sup> 1226, 1239; first amended cross-complaint ¶¶ 1-5, 8-15 & 36-48.) The first amended cross-complaint states sufficient facts to state the causes of action for fraud and negligent misrepresentation against Cross-defendant.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

**TENTATIVE RULING**

**Case:** **Hernandez v. Yolo County, et al.**  
**Case No. CV CV 08-2690**

**Hearing Date:** **May 27, 2010** **Department Fifteen** **9:00 a.m.**

The parties are **DIRECTED TO APPEAR** and to be prepared to schedule a continued hearing date for the motion for summary judgment, or in the alternative, summary adjudication.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

**TENTATIVE RULING**

**Case:** **Paik v. Treon, et al.**  
**Case No. CV PT 09-320**

**Hearing Date:** **May 27, 2010** **Department Fifteen** **9:00 a.m.**

Defendants' attorney David W. Calfee, III's motion to be relieved as counsel is **GRANTED**. (Cal. Rules of Court, rule 3.1362.) This order is not effective until Mr. Calfee files a proof of service with the court showing service of a copy of the signed order on his clients. (Cal. Rules of Court, rule 3.1362(e).)

**TENTATIVE RULING**

**Case:** **Wong v. K. Hovananian Forecast Homes, Inc.**  
**Case No. CV CV 09-434**

**Hearing Date:** **May 27, 2010** **Department Fifteen** **9:00 a.m.**

Cross-defendant Vision Plastering, Inc.'s unopposed motion for determination of good faith settlement is **GRANTED**. (Code Civ. Proc., § 877.6.)

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.